The Effect of the Affordable Care Act on Health-Related Disputes: How New Defenses are Changing the Scope of Mediation and Arbitration

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I. INTRODUCTION

The Patient Protection and Affordable Care Act has drastically changed the scope of mediation and arbitration in healthcare disputes dealing with insurance coverage. While the Affordable Care Act (ACA) is well-known in American society, many do not know what the ACA truly entails.[1] To be in a legal profession working within the health care field, it is now imperative to understand how the Affordable Care Act has and will affect the field of alternative dispute resolution since mediation and arbitration have become the forum of choice for many health care disputes here in the United States.[2]

Alternative dispute resolution (ADR) plays a substantial role in health care related disputes and can be a positive alternative to litigation.[3] In fact, settlements are common in these types of disputes, especially when dealing with medical malpractice lawsuits.[4] But, due to the legal uncertainty that has come about as a result of the Affordable Care Act's mandate that individuals

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[1] *See, e.g.*, Kyle Dropp & Brendan Nyhan, *One-Third Don't Know Obamacare and Affordable Care Act Are the Same*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/upshot/one-third-dont-know-obamacare-and-affordable-care-act-are-the-same.html (discussing a national sample survey of 1,890 adults conducted by Morning Consult on Jan. 25 & 26, 2017, thirty-five percent of people said that Obamacare and the ACA were either different policies or did not know if they were different. These results have a margin of error of plus or minus two percentage points.).

[2] *See generally* R. Wayne Thorpe, JAMS, *Effective Use of Mediation and Arbitration in Health Care Disputes*, 4 BLOOMBERG LAW REPORTS-HEALTH LAW 7, (2011) (available at https://www.jamsadr.com/files/uploads/documents/articles/thorpe-healthcare-disputes-bloomberg-2011.pdf) (addressing the changing field since the enactment of the ACA and the steer toward mediation and arbitration in the health care industry); *see* Holly Hayes, *Mediation in Healthcare*, MEDIATE.COM (June 2009); *see e.g.*, Sheea Sybblis, *Mediation in the Health Care System: Creative Problem Solving*, 6 PEPP. DISP. RESOL. L. J. 3, 2 (2006), citing Harold I. Abramson, *Problem-Solving Advocacy in Mediation*, 59 DISP. RESOL. J. 56, 59 (Aug.-Oct. 2004) (explaining how mediation better enhances communication in medical malpractice and negligence disputes, making it more appropriate than litigation).

[3] *See e.g.*, Gary A. Balcerzak, MS & Kathryn K. Leonhardt, MD, MPH, *Alternative Dispute Resolution in Healthcare: A Prescription for Increasing Disclosure and Improving Patient Safety*, PATIENT SAFETY & QUALITY HEALTHCARE (July/Aug. 2008), https://www.psqh.com/julaug08/resolution.html ("Results from healthcare systems that are using ADR [to avoid a litigious approach] suggest this approach meets the needs of both patients and providers with the additional benefit of reducing costs, encouraging disclosure, and improving patient safety.").

[4] Thomas B. Metzloff, *Alternative Dispute Resolution Strategies in Medical Malpractice*, 9 ALASKA L. REV. 429, 432 (1992).

purchase health insurance, the need for ADR services has risen.[5] The scope of practice is readily changing, so mediators and arbitrators must be able to adapt with it. As new defenses emerge in the wake of a legal obligation to obtain health care coverage, mediators and arbitrators must adapt with the changing field to make sessions as seamless as is readily possible.

The Affordable Care Act provides insurance to individuals who once were unable to gain insurance coverage due to a variety of reasons, including the inability to afford coverage.[6] Under the ACA, minimum essential health care coverage is a legal requirement.[7] The meaning of "minimum essential coverage" depends on an individual's situation. Some people may qualify for an exemption while others may opt to pay a fee each month for failure to obtain the minimum essential coverage required by the Act.[8] Minimum essential coverage includes all government insurance, job-based insurance, and most private insurance.[9] There are also other types of coverage that can qualify as minimum essential coverage under the Affordable Care Act,[10] as well as many categories of coverage that do not count as minimum essential coverage.[11]

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[5] Stephen E. Ronai, *The Patient Protection and Affordable Care Act's Accountable Care Organization Program: New Healthcare Disputes and the Increased Need for ADR Services*, 66 DISP. RESOL. J. 60, 68 (2011).

[6] *See, e.g.*, *ObamaCare Enrollment Numbers*, OBAMACARE FACTS, http://obamacarefacts.com/sign-ups/obamacare-enrollment-numbers/.

[7] *See Minimum Essential Coverage*, OBAMACARE FACTS, http://obamacarefacts.com/minimum-essential-coverage/.

[8] *Id.*

[9] *Id.*

[10] *Id.* Other examples include:

- "Medicare Part A coverage and Medicare Advantage plans
- Most Medicaid coverage
- Children's Health Insurance Plans (CHIP) coverage
- Certain types of veterans health coverage administered by the Veterans Administration
- TRICARE
- Coverage provided to Peace Corps volunteers
- Coverage under the Non-appropriated Fund Health Benefit Program
- Refugee Medical Assistance supported by the Administration for Children and Families
- Self-funded health coverage offered to students by universities for plan or policy years that began on or before Dec. 31, 2014. In later plan or policy years, sponsors of these programs needed to apply to HHS to be recognized as minimum essential coverage
- State high-risk pools for plan or policy years that began on or before Dec. 31, 2014. In later plan or policy years, sponsors of these programs needed to apply to HHS to be recognized as minimum essential coverage."

[11] *Id.* "The following types of health insurance are not minimum essential coverage:

This is why it is important for individuals to know if their coverage falls under a category that may not actually be considered coverage under the rules of the ACA.

Mediators and arbitrators dealing with health-related disputes need to be aware of what coverage entails when dealing with these types of situations. Because many lay persons may not necessarily know the ins and outs of the Affordable Care Act,[12] it is imperative that those aiding in dispute resolution processes know how the Act affects those parties involved in the case. This way, mediators and arbitrators will have the most accurate knowledge and will have the capability to help settle disputes in a way that will be most beneficial to the parties involved. Without this information, a party that does not have health care coverage may not realize the detrimental effect that a trial may have on their case. In the alternative, the other party involved may not realize how good their case really is.

Overall, when dealing with healthcare related disputes concerning a plaintiff's insurance coverage, mediators should act as evaluators and arbitrators should work through an Early Neutral Evaluation[13] process to best aid in this new era of claims under the Affordable Care Act.

This paper will lead one through the changes in the field and end with a proposed set of possible solutions to help mediators and arbitrators be more skillful in their practice when dealing with these disputes. Part II of this paper will cover the expansion of coverage and the consequential changes in health care disputes after the enactment of the Affordable Care Act. This is important because it is the guiding fixture of change in this area of the law and is also

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- Short term health plans
- Fixed benefit health plans
- Supplemental Medicare like Part D and Medigap
- Some Medicaid covering only certain benefits
- Vision only, Dental only, and limited benefit plans
- Grandfathered plans (You will avoid the fee, but won't get the new rights and protections."

[12] *See generally*, Bruce Japsen, *Americans Don't Understand Basic Health Terms, Let Alone Obamacare*, FORBES (Mar. 13, 2016, 9:30 AM), http://www.forbes.com/sites/brucejapsen/2016/03/13/americans-dont-understand-basic-health-terms-let-alone-obamacare-costs/#384c1f0b359e.

[13] Mark A. Buckstein, *An Introductory Primer on Pre-Litigation: ADR Counseling for the Outside Lawyer*, 52 DISP. RESOL. J. 35, 39 (1997) (Early neutral evaluation "is a consensual process that is akin to mediation in that nothing binding will flow from the process (unless desired by the parties) and it will only be as useful as the parties allow it to be... The basic concept behind early neutral evaluation is to seek the honest, unbiased opinion of a well-respected, third-party neutral at an early stage in a dispute and before positions are cast in stone.").

where the main issue of defenses will be discussed in some depth. Part III will propose two ways for mediators and arbitrators to better equip themselves for this changing field. First, mediators need to know the case law and use an evaluative strategy to aid in the mediation process.[14] Mediators need to be able to appreciate the emotional cases that they will be dealing with while also understanding that in this new era, these emotional plaintiffs will no longer be receiving and are no longer entitled to the high stakes damage awards that they once were. [15] Second, because settlements are common in health care disputes,[16] instead of utilizing a binding process, arbitrators should use a non-binding, early neutral evaluation process in order to best assist with the settlement of these new claims arising out of the ACA.[17] Part IV of the paper will look at the current political state of healthcare law and any implications it may have on the proposals set forth in this paper, and Part V will offer a brief conclusion.

II. HEALTH CARE DISPUTES IN THE AFTERMATH OF THE ACA: THE ISSUE OF FUTURE MEDICAL EXPENSES

Under the Affordable Care Act, a new line of defenses has emerged in and out of the courtroom. Because of this, the scope of mediation is ever-evolving in the health care field. The issue of future medical expenses has been debatable for decades,[18] but the language of the Affordable Care Act has brought that debate to the center of health-related disputes.[19]

There is a visible issue with the question of future medical expenses under the Affordable Care Act. Since health care is now more affordable for all and required by law (unless some individual falls into one of the exemption

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[14] *See Favorable ACA Case Summaries*, THECLM.ORG, 1-2 (last updated Jan. 7, 2016) [hereinafter *ACA Case Summaries*].

[15] *See generally*, Bruce G. Fagel, *The Collateral Source Rule Under the Affordable Care Act: The need to prevent a double discount of plaintiff's future medical-care cost damages*, PLAINTIFF MAGAZINE (Jan. 2014) (available at http://www.plaintiffmagazine.com/images/issues/2014/01-january/reprints/Fagel_The-Collateral-Source-Rule-under-the-Affordable-Care-Act_Plaintiff-magazine.pdf).

[16] Metzloff, *supra* note 4, at 432.

[17] *See id.* at 442–43 (citing Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values,* 1990 U. CHI. LEGAL F. 303, 334–35 (1990)).

[18] *See, e.g.*, Wendy D. May et al., *Texas: Medical Expenses*, 2011 A.B.A.: SEC. OF LITIG. 387, 387–94 (looking at this debate under Texas law).

[19] *See, e.g.*, Eileen L. Moss et al., *Reducing Past and Future Medical Damages Through the Affordable Care Act*, DRI'S FOR THE DEF., 45 (July 2016).

categories),[20] there will likely be more and more litigation in the future as to whether damage awards for future medical expenses can remain as high as they have been in the past, or whether now with the enactment of the ACA, they will be limited by insurance coverage.[21] The main issue here is whether a mediator or arbitrator should continue to be forbidden from considering a plaintiff's health care coverage when assessing future medical costs and attempting to resolve disputes.

In the past, many jurisdictions have relied on collateral source rules to inhibit defendants from using a plaintiff's insurance benefits to show that damage awards should be lower.[22] These jurisdictions previously ruled that in situations where there is a mandatory, self-effectuating right to subrogation[23] (as with Medicare or Medicaid) or a contractual right to subrogation (as is common with insurance coverage contracts), defendants are unable to introduce evidence of a collateral benefit that was a result of the subject of the original claim.[24]

By keeping this type of information out of the courtroom, and thus out of settlement talks, there is ultimately a failure to consider the minimum essential coverage requirements under the ACA.[25] Because of these requirements, a

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[20] Maxwell J. Mehlman et al., *Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for Future Medical Expenses Under the Affordable Care Act*, 25 ANNALS OF HEALTH L. 35, 42 (2016), (citing Cynthia Cox & Larry Levitt, *The Individual Mandate: How Sweeping?*, KAISER FAM. FOUND. (March 21, 2012), http://kff.org/health-reform/perspective/the-individual-mandate- how-sweeping/).

[21] *See* Mark S. Yagerman & Max Bookman, *How Obamacare May Limit Projected Expenses in Personal Injury Life Care Plans*, (unpublished manuscript), *available at* http://cardozo.yu.edu/how-obamacare-may-limit-projected-expenses-personal-injury-life-care-plans. (last visited March 31, 2017).

[22] *See* Cara Q. Hanson, *Ohio's Collateral Source Rule Following* Robinson v. Bates *and the Enactment of Ohio Revised Code Section 2315.20*, 40 U. TOL. L. REV. 711 (2009); *see, e.g.*, Ohio Rev. Code Ann. §2315.20 (West 2005).

[23] Cecil G. King, *Subrogation Under Contracts Insuring Property*, 30 TEX. L. REV. 62, 62 (1951) (quoting BLACK'S LAW DICTIONARY 1669 (3d ed. 1933), "Subrogation is generally defined as 'the substitution of one thing for another, or of one person in the place of another with respect to rights, claims, or securities.").

[24] Mehlman et al., *supra* note 20, at 60 (quoting Ohio Rev. Code. Ann. § 2315.20(A) (West 2005), "In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of . . . the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right to subrogation, a contractual right of subrogation, or a statutory right of subrogation . . . .").

[25] *Types of Health Insurance that Count as Coverage*, HEALTHCARE.GOV, https://www.healthcare.gov/fees/plans-that-count-as-coverage/ (last visited Nov. 11,

defendant should be permitted to consider a health care plan as evidence since no matter what health care coverage a plaintiff may obtain in the future, any such coverage must meet the ACA's minimum requirements. [26] Now, defendants are slowly able to advance a plaintiff's insurance policy, which is now considered a requirement by law, as evidence that would minimize damages. So, settlement talks through mediation and arbitration in the health care field are greatly influenced as well.

The question of future medical expenses in collateral source jurisdictions is as prevalent as ever now under the Affordable Care Act.[27] In fact, it has become a topic of debate.[28] The two main defenses that emerge from that area under the ACA are the Affordable Care Act itself as a collateral source, and a plaintiff's failure to mitigate damages by failure to purchase health care coverage. Both topics will now be looked over in some depth.

A. The ACA as a Collateral Source

Due to their recent emergence, these new lines of defense that the Affordable Care Act has brought to the forefront of healthcare disputes are scarcely covered by courts throughout the United States. However, even with it being so new, there are still several cases that have begun to delve into this subject.[29] In order for mediators and arbitrators to understand the cases coming before them, they need to understand the new line of defenses and evidence that are appearing throughout health care related disputes.[30] In certain states, the collateral source rule has even been abrogated as a rule of evidence, which in turn allows a defendant to present evidence of a plaintiff's insurance coverage to the jury.[31]

In *Brewington v. United States*, the defendant introduced evidence of insurance coverage under the Affordable Care Act as an affirmative defense

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2016) (stating some examples include plans bought through the Health Insurance Marketplace, grandfathered plans, job-based plans, most student-health plans, CHIP, etc.).

[26] *Id.*

[27] Rebecca Levenson, Comment, *Allocating the Costs of Harm to Whom They are Due: Modifying the Collateral Source Rule After Health Care Reform*, 160 U. PA. L. REV. 921, 935 (2012).

[28] *See also* Ann S. Levin, *The Fate of the Collateral Source Rule After Healthcare Reform*, 60 UCLA L. REV. 736 (2013); *see generally*, Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873 (2011).

[29] *See ACA Case Summaries*, *supra* note 14.

[30] *Id.*

[31] Levenson, *supra* note 27, at 941.

by presenting it as a collateral source of future medical care expenses.[32] The Central District of California held that is was appropriate to consider the Affordable Care Act and available health insurance policies in determining the reasonable value of future medical expenses.[33] Therefore, the defendant in this case, contrary to the historical trend of collateral source jurisdictions, was able to present insurance coverage as a collateral source to the jury as an affirmative defense.[34] There are a string of cases across the United States that have also followed this same trend.[35]

To better understand the implications, it is necessary to look at a real life situation from the *Brewington* case referenced above. Stephan Brewington went to the Department of Veteran Affairs Greater Los Angeles Hospital (VA) for treatment of a branch retinal vein occlusion,[36] which was affecting the vision in his left eye.[37] The treatment was an injection of a drug called Avastin. Instead of injecting Avastin, the VA injected Stephan's eye with a chemotherapy drug and caused irreversible blindness in his left eye, chronic pain, headaches, depression, and anxiety.[38] In this case, Stephan incurred no medical expenses up to the point of trial because all his care was paid for by the VA.[39] The court allowed the defendant to introduce the Affordable Care Act as evidence of a collateral source for future medical expenses under California Law so that the defendant would not be required to pay damages for medical expenses that are covered by insurance in the future.[40]

In the past, Stephan would have been awarded a much larger sum of money because insurance was not required by law and the defense would not be allowed to present insurance as evidence of a collateral source. Thus, the defense would have to pay the future medical expenses that insurance would cover and the plaintiff would get extra money. Now that the law is changing to favor insurance as evidence of a collateral source, cases much like Stephan's that are settled through mediation or arbitration rather than litigation will likely

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[32] Brewington v. United States, No. CV 13-07672-DMG, 2015 WL 4511296, at *6 (C.D. Cal. July 24, 2015).

[33] *Id.* at *7.

[34] *Id.* at *6–7.

[35] *Healthcare Malpractice Claims: 2016 Update*, AMERICAN INTERNATIONAL GROUP (AIG), 15-17, http://www.lexingtoninsurance.com/content/dam/lexington-insurance/america-canada/us/documents/lexwp-healthcare-malpractice-claims-2016.pdf.

[36] Sadaf Hamid, Sajid Ali Mirza & Ishrat Shokh, *Branch Retinal Vein Occlusion*, 20 J. AYUB MED. C. ABBOTTABAD 128, 128 (2008) ("Branch retinal vein occlusion causes a painless decrease in vision, resulting in misty or distorted vision.").

[37] *Brewington*, 2015 WL 4511296, at *1.

[38] *Id.*

[39] *Id.* at 5.

[40] *Id.*

be experiencing the same results. In mediation, mediators must consider insurance plans when helping plaintiff's and defendant's counsel negotiate a reasonable award of damages. In arbitration, much like litigation, the defense counsel will likely be able to present evidence of plaintiff's insurance as a collateral source that can lower damage costs for the defendant.[41]

B. The Duty of Plaintiffs to Mitigate Damages

In most jurisdictions, a plaintiff has a duty to mitigate their damages and cannot be compensated for damages which could have been avoided by reasonable effort or expenditure.[42] Now, in light of the emerging defenses under the ACA, defense counsel has the ability to present to the court, mediator, or arbitrator, evidence of lack of insurance coverage (which is now required by law under the Affordable Care Act) to prove that a plaintiff has not mitigated their damages by failure to purchase or enroll in a health insurance plan.[43] This is a brand new defense and one that was incapable of being brought to the table before the enactment of the Affordable Care Act.

Now, under the Affordable Care Act, an injured plaintiff has a legal duty, as do all other American citizens, to obtain health insurance coverage.[44] Whether that be from a private insurance company, Medicare, Medicaid, or through one of the ACA's plans, every United States citizen is required by law to obtain health care coverage. Formerly, the duty to mitigate damages did not include information regarding health insurance coverage.[45] In fact, a defendant was not allowed to bring up insurance coverage at all in court or in alternative dispute resolution proceedings.[46] This means that in the past, a plaintiff could obtain a damage award through litigation or an alternative proceeding that would include the entirety of damage, even if their insurance had already covered part of the damage amount.

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[41] Alan Scott Rau, *Evidence and Discovery in American Arbitration: The Problem of "Third Parties,"* 19 AM. REV. INT'L. ARB. 1, 9 (2008) (quoting Stephen J. Ware, "Interstate Arbitration: Chapter 1 of the Federal Arbitration Act," *in* EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 88, 89, 108 (2006)).

[42] *See, e.g.*, Green v. Smith, 261 Cal. App. 2d 392, 396 (1968) (discussing how an injured party is expected to take measures that will mitigate their damages but, an injured party is not required to take unreasonable measures and reasonableness is judged in light of the situation and not by hindsight. (citing Jordan v. Talbot, 55 Cal. 2d 597, 611 (1961); *e.g.*, Basin Oil Co. of Cal. v. Baash-Ross Tool Co., 125 Cal. App. 2d 578, 602-603 (1954)).

[43] Yagerman & Bookman, *supra* note 21, at 5.

[44] *Minimum Essential Coverage*, *supra* note 7.

[45] *See, e.g.*, James P. Moceri & John L. Messina, *The Collateral Source in Personal Injury Litigation*, 7 GONZ. L. REV. 310, 310–11 (1972).

[46] *See Id.*

This is beginning to change in the aftermath of the Affordable Care Act. Now, the fact that a plaintiff does not have insurance coverage can potentially be brought as evidence in and out of the courtroom. This will serve as evidence that the plaintiff has failed to mitigate their damages because having insurance coverage is now considered a legal duty.[47] And, failure to adhere to that duty equates to failure to mitigate whatever damage amount would have been covered by said insurance costs and coverages.[48] Because of this, mediators and arbitrators must be aware of this duty and the mitigation factors that go with it.

III. WAYS TO MAKE MEDIATION AND ARBITRATION EASIER IN THE WAKE OF THE ACA

To better equip themselves with the changing field, mediators and arbitrators must first understand the field. Therefore, they must understand the case law.[49] Understanding the new and emerging case law will aid in making sure that fair and accurate settlements are reached among parties. Being that mediators and arbitrators are the main link in these settlement talks, it is imperative that they know what they are talking about.[50]

When dealing with mediation, a mediator who works as an evaluator will be in the best position to aid in settlement talks when dealing with cases arising out of these new claims.[51] This will give the mediator an opportunity to evaluate the parties understanding and give them the best opinion on the matter. As for arbitration, an early neutral evaluation process is the best way to achieve these results. By having an expert facilitate settlement talks, with no pressure on securing a binding agreement, this kind of process will aid in not only a fair settlement talk, but also an informative session for both the parties as well as their representatives.

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[47] Yagerman & Bookman, *supra* note 21, at 5.

[48] *Id.*

[49] For the relevant case law see *supra* note 35.

[50] *See* Stephen Meili & Tamara Packard, *Alternative Dispute Resolution in a New Health Care System: Will it Work for Everyone?*, 10 OHIO ST. J. DISP. RESOL. 23, 28 (1994).

[51] *See* Allan E. Barsky, *Meditative Evaluations: The Pros and Perils of Blending Roles*, 45 FAM. CT. REV. 560 (2007) (discussing the pros and cons of using a mixed mediation-evaluation approach).

A. Mediators Must Work as Evaluators

A mediator working as an evaluator is the best strategy that mediators can utilize when dealing with cases arising out of insurance coverage under the Affordable Care Act. Once the mediator understands the case law, this technique will allow the mediator to point out the strengths and weaknesses in both sides of the case, as well as make recommendations to the parties on both sides.[52] This strategy can also aid parties if the case ultimately ends up going back to court.[53] This type of mediator is neutral and usually has some expertise in the issues at hand so as to provide the parties with the most well-rounded advice.[54] Because the primary role of mediators is to facilitate a voluntary agreement,[55] an evaluative mediator will be in the best position to do so in these specific circumstances.

1. UNDERSTAND THE CASE LAW

Mediators must understand the field of emerging case law (as discussed already) in order to adequately mediate disputes in collateral source jurisdictions.[56] Skillful mediators are able to draw upon legal precedent and prior experiences in order to enhance their persuasiveness as well as their evaluations.[57] Unfortunately, there are times when mediators are inadequately prepared for settlement talks and dispute resolution sessions, or do not fully

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[52] *See e.g.*, Lee Jay Berman, *Choose Carefully: All Mediators Are Not Created Equal*, AMERICAN INSTITUTE OF MEDIATION (March 2011), http://www.americaninstituteofmediation.com/pg64.cfm ("An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues.").

[53] Katina Foster, *A Study in Mediation Styles: A Comparative Analysis of Evaluative and Transformative Styles*, MEDIATE.COM (June 2003), http://www.mediate.com/articles/fosterk1.cfm ("The evaluative mediator intervenes in the mediation more than the facilitative mediator by making recommendations or providing opinions as to what might occur should the case go back to court (Zumeta). Evaluative mediation is often used when money is an issue in the dispute.").

[54] *See id. See also* Diane Cohen, *Evaluative Mediation*, MEDIATE.COM (March 2011), http://www.mediate.com/articles/CohenDbl20110321.cfm.

[55] *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 10 (1996), citing STANDARDS OF CONDUCT FOR MEDIATORS (American Arbitration Association, Society of Professionals in Dispute Resolution, and American Bar Association Section on Dispute Resolution, 1994).

[56] *See supra* note 34.

[57] Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 195 (2009).

understand the field of law at issue.[58] Because of this, it is important for mediators to not only show an understanding of the case law, but to be able to evaluate the issues brought before them by using the case law previously discussed.[59]

This type of mediation setting can help the parties understand their case better if they are not fully aware of the implications that the ACA now has on healthcare disputes.[60] First and foremost, the mediator must be up to date on the case law in this area so that they can adequately explain to the parties the strengths and weaknesses of their case.[61] A mediator in this instance must evaluate the level of knowledge of both sides and then proceed with a strategic plan following that initial evaluation.

Depending on the knowledge of the parties, the mediator may not even have to bring up prior case law if the parties already understand the legal issues. That is why it is important that the mediator allow the parties to lay out their case first, and then proceed to evaluate the level of knowledge he or she will have to relay to both sides. Whether or not the parties understand the precedent does not change the level of knowledge that the mediator must have; either way, the mediator must be prepared to explain the case law if need be.

2. *PROVIDE OPINIONS*

Unlike other types of mediation strategies, evaluative mediators are allowed and even encouraged to give their opinions regarding the matter at hand.[62] Because the law is new and evolving, mediators should be giving their opinions when these cases are in front of them to further comprehension of these legal analyses by one or both parties in the case. The level of opinion on these matters will depend on the level of understanding that the parties have. If the parties show a full understanding of the case law and the legal issues under the ACA (meaning that they understand that damages can be lessened due to the ACA as a collateral source or the plaintiff's failed duty to mitigate damages), then the opinions given by the mediator will be less about the law and more about the strength of each side's case.[63]

On the other hand, if the parties do not depict a thorough understanding of the case law and legal issues surrounding their claims, then it will be important for the mediator to not only discuss the relevant case law, but to also give

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[58] *See e.g.*, Berman, *supra* note 52.

[59] *Supra* note 34.

[60] Riskin, *supra* note 55, at 24.

[61] *See* Meili & Packard, *supra* note 50.

[62] Berman, *supra* note 52.

[63] Riskin, *supra* note 55, at 29.

opinions on the strategy that both parties are using.[64] For example, one party may not know that they failed to mitigate damages by not purchasing insurance. Or, a party may not be aware that they can use the ACA as evidence of a collateral source. So, if one or more parties do not have a thorough understanding, it will be up to the mediator to not only share his or her advice on outcomes, but on strategies as well.

3. *PREPARATION IF THE CASE GOES TO TRIAL*

One thing that sets an evaluative mediator apart from other mediators is the step that an evaluative mediator takes to prepare parties in case a settlement is not reached and the case ultimately ends up going to trial.[65] Obviously, settlement is the main goal, but settlements are not always attainable.[66] In cases such as these, where parties do not fully grasp the depth of the legal issues at hand, it is important to have an evaluative mediator. This is important because both plaintiff and defendant need someone who can help them understand their case and who will explain legal strategies which they may not know are available to them in case trial becomes inevitable.[67] It is important that in and out of the courtroom these issues are understood, so even if mediators are unable to reach a settlement, they can still aid in reasonable trial outcomes for both parties under the new law.

All in all, to be as helpful as possible, a mediator must understand the case law, evaluate the parties' understanding of the case law and the issues at hand, be capable of giving opinions on strategy and understanding, and ultimately aid the parties to a resolution whether that be a settlement or preparation for a trial.

B. Early Neutral Evaluation

Some of the primary goals surrounding court alternative dispute resolution programs are to conserve time and energy.[68] These goals can be best attained

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[64] *Id.*

[65] Foster, *supra* note 53.

[66] *See generally* Jack G. Marcil & Nicholas D. Thornton, *Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success*, 84 N.D. L. REV. 861 (2008) (addressing common reasons why mediation can be unsuccessful).

[67] *See* Riskin, *supra* note 55, at 24.

[68] Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 590 (2008) (discussing the relative weight given to disputants' preferences and the driving forces behind ADR procedures). *See also* COLO. REV. STAT. §

through Early Neutral Evaluation[69] (ENE) when arbitrating issues of injury and insurance under the Affordable Care Act. Early Neutral Evaluation should be considered in these instances because it gives the parties an opportunity to assess the situation without having the pressure of an assessment becoming binding.[70] This is important because within these situations, obstacles exist that were not relevant before the enactment of the ACA. Also, there are quite a few benefits that the ENE process has over traditional mediation.[71]

With Early Neutral Evaluation, the sessions are informal.[72] The sessions involved in the process are geared toward facilitating comprehension of issues and hopefully a settlement between parties through an evaluation of both parties' relevant arguments and positions. [73] An evaluation is usually completed within two weeks of the session or sessions, and at that time the parties can decide what path to take next; the end goal is for this process to aid

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13-22-305 (2017); HAW. REV. STAT. § 613-2 (2017); UTAH CODE ANN. § 78B-6-203 (2017).

[69] Harvard Law School Library, *Alternative Dispute Resolution Research* (Feb. 8, 2017), http://guides.library.harvard.edu/c.php?g=310591&p=2078483 ("Early Neutral Evaluation (ENE) is when disputing parties submit their case to a neutral evaluator through a confidential 'evaluation session.' The neutral evaluator considers each side's position and renders an evaluation of the case. Contracting parties can include an ENE clause in the contract, which represents their agreement to submit to ENE in good faith to resolve any contractual disputes.").

[70] *Early Neutral Evaluation: Getting An Expert's Assessment*, AMERICAN ARBITRATION ASSOCIATION (2005), http://www.ncbusinesslitigationreport.com/uploads/file/AAA%20ENE%20Procedures.pdf [hereinafter *Getting An Expert's Assessment*] ("ENE proceedings are confidential and encourage direct communication between adversarial parties about possible claims and supporting evidence-particularly important in situations where the disputants are far apart in their views on how the law applies to the case in question or what the case is worth. In these instances, an evaluation of the dispute that seeks to determine best and worst case alternatives can point the way to a negotiated agreement. Parties engaging in the ENE process receive access to a diverse panel of neutral-experts in their industries or businesses who are unable to effectively evaluate the issues in dispute.").

[71] RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS 317 (2010), citing Wayne D. Brazil, *Early Neutral Evaluation or Mediation? When Might ENE Deliver more Value?*, DISP. RESOL. MAG., 10-15 (2007) ("A major advantage of ENE over mediation...is that 'the bases for the evaluative component of the process are systematically developed, fully visible to all parties, and as comprehensive as the parties' knowledge permits' -- each party known 'every piece of evidence and every argument' that the evaluator is considering.").

[72] *Getting an Expert's Assessment*, *supra* note 70.

[73] *Id. See* Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 126 (1996).

in issue understanding and potentially induce a final settlement between parties.[74]

Early Neutral Evaluation is a great alternative in a situation involving insurance as evidence of a collateral source and/or as evidence of a plaintiff's failure to mitigate their damages. The reason for this is that these types of proceedings will give the parties adequate time to understand the issues of the case and their potential options.[75] Also, given that experts will be the facilitators of the session,[76] this is also an opportunity for the lawyers on both sides of the case to get a full picture of the legal issues that surround this new era of injury and health law (assuming that with this being so new, lawyers may not be up to date with all of the intricacies that are involved in these disputes).[77]

Another important aspect of these sessions is the fact that they are nonbinding.[78] To bind parties to an agreement or to proceedings in a situation where the law is relatively new and the issues presented are not fully developed would lead to faulty legal solutions. Since Early Neutral Evaluation sessions are non-binding, it allows both parties to learn and gain information through experienced individuals that will hopefully aid in an informed and trusted settlement decision. With this process, there is also no need to worry that the evaluator (arbitrator) will have any bias toward one side or another because adequate steps are taken to ensure that an unbiased result is reached.[79]

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[74] *Id. See also* Robert Rack, *Early Neutral Evaluation: A Comprehensive History Told With Intellectual Passion and Clarity*, 19 DISP. RESOL. MAG., 16 (2012-2013).

[75] *Id.*

[76] *Id.* ("When working with the AAA, parties engaging in the ENE process receive access to the AAA's diverse panel of neutrals-experts in their industries or businesses who are able to effectively evaluate the issues in dispute. At the conclusion of the review, the neutral evaluator's non-binding report, which consists of an unbiased opinion of the issues presented, can serve as a catalyst for settlement negotiations, can enhance communication between the parties and can be employed to dispose of specific issues prior to proceeding with other dispute resolution options.").

[77] Chris Blaylock, *The Vital Role of the Collateral Source Rule in United States Healthcare Financing*, SSRN (Dec. 20, 2013), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2369404.

[78] Magistrate Judge J. Daniel Breen, *Mediation and the Magistrate Judge*, 26 U. MEM. L. REV. 1007, 1019-20 (1996).

[79] *Getting an Expert's Assessment*, *supra* note 70 ("No person shall serve as an evaluator in any dispute in which that person has any financial or personal interest in the result of the early neutral evaluation, except by the written consent of all parties. Prior to accepting an appointment, the prospective evaluator shall disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA shall either replace the evaluator or immediately communicate the information to the parties for their comments. In the event that the parties

When going into these sessions, arbitrators must be well versed in the case law.[80] Without a thorough understanding of the case law, arbitrators may find themselves in a position where they are giving inadequate or faulty advice if they do not understand the new implications of the Affordable Care Act. Examples will be used below to outline how arbitrators can ensure that they are well prepared for an Early Neutral Evaluation session and that parties can get the most out of the session in order to thwart further litigation and hopefully come to a final settlement on the matter at hand.

The Early Neutral Evaluation process contains the following steps: initiation of early neutral evaluation, appointment of the evaluator, qualifications of the evaluator, submission and exchange of initial written statements, evaluation session, the evaluation, confidentiality, applications to court and limitation of liability, evaluator fees and expenses, and administrative fees.[81] The three most important steps to concern oneself with when dealing with cases concerning collateral sources and the Affordable Care Act under an Early Neutral Evaluation process are the following: submission and exchange of initial written statements, evaluation session, and the evaluation.

1. SUBMISSION AND EXCHANGE OF INITIAL WRITTEN STATEMENTS

During the initial stages of the Early Neutral Evaluation process, parties are tasked with setting a schedule so that both sides exchange an initial written statement through submittal to the evaluator.[82] In this stage, parties will essentially be submitting what they believe are the claims they have against the opposing party or defenses to claims brought against them. Also, because damages and liability are supposed to be included in these statements, there may or may not be evidence of insurance by one party or another.[83]

This is the beginning stage of information. This stage is where the evaluator will get a glimpse as to how much information the plaintiff and defendant have on Affordable Care Act policies coupled with collateral source

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disagree as to whether the evaluator shall serve, the AAA will appoint another evaluator. The AAA is authorized to appoint another evaluator if the appointed evaluator is unable to serve promptly.").

[80] *See ACA Case Summaries*, *supra* note 14.

[81] *Getting an Expert's Assessment*, *supra* note 70.

[82] *Id.* ("The initial statement describes the substance of the dispute, the parties' views of the key liability and damage issues, key evidence and any other information that may be useful to the evaluator. The evaluator and the parties will decide on the length and extent of the initial written statements.").

[83] *Id.*

rule issues (assuming this is in a collateral source rule jurisdiction). If the parties are aware that the Affordable Care Act is changing the scope of collateral source jurisdictions, then the plaintiff's statement will likely include insurance coverage because failure to do so may depict a failure to mitigate damages. On the other hand, if there is adequate knowledge of this ever-changing scope of case law, the defendant's statement will likely depict a liability or damages amount that is less than normal. The statement also will likely either already have calculated in insurance coverage of the plaintiff or will deduce that the amount will be lower after establishing what insurance has already covered.

At this stage in the process, an arbitrator should be able to get a basic picture of the level of understanding that both sides have going into the evaluation session. With this knowledge, the arbitrator can adequately prepare for the session. If there is not a high level of understanding, then the arbitrator will know going in that he or she must prepare to instruct both parties (or may only instruct one party if one side has a level of understanding higher than the other) of the new issues of collateral sources in health care. The arbitrator must also be prepared to explain the case law pertaining to the issues affecting the parties. A chart or diagram may also be helpful to prepare if there is a low understanding. This is because visuals are often more influential than vocal instructions since studies have shown that visual learning has had greater impacts than vocal explanations to another person.[84]

2. *EVALUATION SESSION*

The evaluation session is the time for both parties to make their case. This will be the time when the parties will present, verbally or through use of documents, slides, other media, etc., the claims or defenses that they believe they have along with the evidence each party has to back up those claims and/or defenses.[85] Because these sessions are informal, it allows for a more open level of dialogue.[86] Evaluators should utilize that in encouraging both

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[84] *See e.g.*, Karla Gutierrez, *Studies Confirm the Power of Visuals in eLearning*, SH!FT DISRUPTIVE LEARNING (July 8, 2014), http://info.shiftelearning.com/blog/bid/350326/Studies-Confirm-the-Power-of-Visuals-in-eLearning.

[85] *Getting an Expert's Assessment*, *supra* note 70 ("The evaluation session is informal and the rules of evidence do not apply. Each party shall have in attendance throughout the evaluation session a representative with settlement authority. There is no formal examination or cross-examination of witnesses and the presentations and discussions are not recorded. After the evaluation session concludes, the parties may agree to participate in a follow-up session if it would be productive or proceed to receive the evaluation.").

[86] *Id.*

parties to present their sides and in allowing the parties to, hopefully, communicate with one another in an attempt to reach an agreement. This is arguably the most important part of the process for all parties involved.[87]

At this stage, both sides will present their arguments, and questions will be permitted to delve into those arguments and the evidence involved.[88] At this time, evaluators should feel free to ask questions if they are unsure of specifics, or if they would like to further clarify something for one or both sides.[89] It is at this stage that considerations of health insurance coverage would arise, which should occur in a collateral source jurisdiction. If no health insurance coverage is offered by the plaintiff, then the evaluator may want to record that and then wait until after the parties have presented their evidence to bring up the issue. Waiting until the end will allow all of the cards to be on the table without interference. This way, the evaluator will be able to give a thorough explanation, meaning an explanation of why health insurance coverage should be included while also ensuring that he or she has all of the notable facts of evidence before explaining this to one or both parties.

This is the same with the defense. If the defense does not ask about health insurance and if it is not brought up, then they too will learn of that later when the evaluator informs the parties of the relevant law. But, the evaluator must be careful not to overstep on strategy or to give one side an advantage over another. For example, if the plaintiff fails to include health insurance, and the defense wants to know whether the plaintiff has insurance so that it can prove that the plaintiff failed to mitigate his or her damages, then that is an area in which the evaluator should step in and explain. However, if the plaintiff has insurance and the defense does not know that it can use it to bring the damage costs down, then the evaluator should make a choice. The evaluator can stay out of it because that is a defense strategy, and the defense arguably could have researched whether it could use insurance as evidence. Or, in the alternative, if the evaluator thinks that explaining this possible defense could promote

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[87] Wayne Brazil, *Informalism and Formalism in the History of ADR in the United States and an Exploration of the Sources, Character, and Implications of Formalism in a Court-sponsored ADR Programme*, *in* FORMALISATION AND FLEXIBILISATION IN DISPUTE RESOLUTION 296 (Joachim Zekoll, Moritz Batz, & Iwo Amelung eds., 2014) ("The lynchpin component of the ENE process was (and remains) a 2-5 hour evaluation session, during which each party, in the presence of the other, presents the support for its positions to a neutral lawyer with deep expertise in the subject matter of the litigation. After hearing rebuttal presentations and probing with questions, the neutral evaluator develops and commits to writing an assessment of the relative strengths and weaknesses, on the merits, of the litigants' claims and defenses.").

[88] *Id.*

[89] KISER, *supra* note 71, at 317.

settlement and bring about a positive response or more thorough understanding of the issues, then he or she could decide to explain the lacking defense. Either way, it will be fact specific, situation specific, and will be up to the evaluator to determine when and if explanation should be provided.

3. *THE EVALUATION*

An evaluation is usually written by the evaluator within 14 days of the evaluation session.[90] This is perhaps the most important time for the evaluator to ensure that he or she has all of the information in order and has processed the claims and evidence in accordance with the collateral source rules under the Affordable Care Act. Because the evaluator has heard all of the evidence and arguments and is now required to write the evaluation, this will be the time to point out the strengths and weaknesses in both sides' arguments.[91]

At this point in the Early Neutral Evaluative process, the evaluator needs to take a step back and assess the situation as a whole.[92] The evaluator has heard all of the evidence, is now aware of both sides' informative level on collateral sources, and should have an idea in mind on how he or she would like to proceed in writing the formal evaluation. Again, as discussed before when dealing with the evaluation session itself, it will be the evaluator's decision whether or not to fully explain this emerging area of the law. Again, it depends on the strategy of the parties and the facts and situations of each individual case. Ultimately, however, it will be the evaluator's decision. Additionally, if a settlement has not been reached, it will also be under the evaluator's discretion whether or not to suggest another ENE session.[93]

Overall, when using an Early Neutral Evaluation process, the evaluator must know the case law in order to be in the best situation to help. He or she must be able to link the case law in the collateral source jurisdiction dealing with health care coverage and health disputes to the specific facts and issues at hand. He or she must be able to ask questions of both parties that (1) alert the evaluator regarding how informed each party is, and (2) inform the parties what they may be missing to help aid in settlement or better comprehension of issues. Finally, it will be up to the evaluator to assess the situation and decide how much information he or she will provide based on the situation's facts

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[90] *Getting an Expert's Assessment*, *supra* note 70 ("The evaluation may also be presented verbally upon the request of any party. After the receipt of the evaluation, the parties can make further inquiry about issues and points made in the evaluation.").

[91] ZEKOLL, BATZ, & AMELUNG, *supra* note 87, at 296.

[92] *See* Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 282 (1986).

[93] KISER, *supra* note 71, at 317.

and urgency. To be capable of this, an informed evaluator is an absolute necessity. Only an informed evaluator will become an informative evaluator.

IV. FUTURE IMPLICATIONS DUE TO THE CURRENT POLITICAL STATE OF HEALTHCARE LAW

Under the Trump Administration, an executive order was signed on January 20, 2017, that could potentially dismantle the Affordable Care Act in the coming years.[94] While this executive order may have significant effects on the specificity of the Act if a new law were to be passed, the general analysis of this paper will remain the same. This is primarily because no matter what new legislation is passed, if any, prior case law remains precedent until new case law is established. In fact, the executive order merely states an intent to replace the law, but has no binding effect regarding a repeal of the Affordable Care Act.[95] Even if it was repealed, it would take a while to switch from one system of healthcare to another, in addition to the substantial amount of time it would take to draft new legislation and filter it through Congress. Thus, it is unlikely that there will be any change in 2017.[96] Further, an attempt to vote on a GOP bill that would repeal the Affordable Care Act was cancelled on March 24, 2016, signaling that there will be no replacement legislation of the Affordable Care Act any time soon.[97] A second attempt to repeal the Affordable Care Act was not voted on due to lack of votes for passage in the Senate on September 26, 2017.[98] Additionally, a second executive order

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[94] *Executive Order Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal*, THE WHITE HOUSE (Jan. 20, 2017), https://www.whitehouse.gov/the-press-office/2017/01/2/executive-order-minimizing-economic-burden-patient-protection-and.

[95] Margot Sanger-Katz, *What Does Trump's Executive Order Against Obamacare Actually Do?*, THE NEW YORK TIMES (Jan. 21, 2017), https://www.nytimes.com/2017/01/21/upshot/what-does-the-order-against-the-health-law-actually-do.html.

[96] *See* Michelle Andrews, *It Could Take Trump a While to Repeal Obamacare*, TIME (Nov. 11, 2016), http://time.com/money/4568409/donald-trump-obamacare-repeal/.

[97] *See* Robert Pear et al., *In Major Defeat for Trump, Push to Repeal Health Law Fails*, THE NEW YORK TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html. *See also* Stephen Collinson et al., *House Republicans Pull Health Care Bill*, CNN (Mar. 25, 2017), http://www.cnn.com/2017/03/24/politics/house-health-care-vote/index.html?sr=fbCNN032417house-health-care-vote0856PMStoryLink&linkId=35830892.

[98] Rachel Roubein, *TIMELINE: The GOP's failed effort to repeal Obamacare*, THEHILL (Sept. 26, 2017), http://thehill.com/policy/healthcare/other/352587-timeline-the-

dealing with healthcare was signed on October 12, 2017, but this executive order can be analyzed in the same way as the previous one, meaning that it will not affect the analyses discussed.[99] Because it is highly unlikely that any significant changes or repeals to healthcare will be made anytime soon, leaders have signaled that they will move on to focus their efforts on tax reform rather than health reform.[100] Therefore, it is highly improbable that any findings in this paper will be significantly affected anywhere in the near future.

Even if a change to healthcare coverage were to occur, although the political climate is signaling that change is far off, this analysis will continue to apply to the state of healthcare disputes. While significant changes may occur in future legislation when dealing with factors such as costs, coverage specifics, and availability of coverage, the proposals in this paper will continue to be relevant. All in all, the duty to mitigate damages has continued to remain the same. In collateral source jurisdictions, the new legislation will still be regarded as a collateral source so long as healthcare coverage is a legal requirement. The established case law will remain precedent until new precedent is established.

Therefore, mediators must still be knowledgeable of the case law. Not only will mediators have to be knowledgeable of the new case law under the any potential replacement of the Act, but they will also have to be knowledgeable of the case law provided in this paper. Since the legal analysis is not currently changing and will not change under a new healthcare law so long as it still requires citizens to obtain healthcare coverage, the case law dealing with the Affordable Care Act will continue to be relevant when and if a new policy is implemented. And even if the obligation to obtain health insurance were to change, mediators will still have to use the same techniques to explain and

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gop-effort-to-repeal-and-replace-obamacare (for a complete timeline of the events surrounding healthcare changes and appeals from November 2016 to present).

[99] *Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States*, THE WHITE HOUSE (Oct. 12, 2017), https://www.whitehouse.gov/the-press-office/2017/10/12/presidential-executive-order-promoting-healthcare-choice-and-competition (a second executive order dealing with healthcare was signed in October of 2017, but the analysis of this one remains the same as the previous one).

[100] Erin Kelly et al., *Republicans Give up on Obamacare Repeal Bill, Move on to Other Issues*, USA TODAY (Mar. 24, 2017, 6:01 PM ET), http://www.usatoday.com/story/news/politics/2017/03/24/house-obamacare-repeal-vote/99573690/; *see also* David Morgan, *Republicans Move on Tax Reform; Fed Officials See Economic Threats*, REUTERS (Oct. 5, 2017), https://www.reuters.com/article/us-usa-tax/republicans-move-on-tax-reform-fed-officials-see-economic-threats-idUSKBN1CA20J.

enhance understanding for all parties involved as new changes only bring more confusion and complexity.

Early Neutral Evaluation will continue to be the best arbitration technique in these situations. Again, the specifics of a new Act may be different, but the general legal duty to obtain healthcare will remain the same (and even if it is not, ENE can help aid in clarity as described above). Therefore, a non-binding process that allows an expert to access the situation and aid in understanding of a new area of the law will continue to be imperative. Similar to mediators, arbitrators working in this area must understand the case law previously outlined in this paper dealing with the Affordable Care Act, as well as any future case law dealing with the Affordable Care Act, or any replacement policy of the Affordable Care Act. All of the current law will continue to apply to healthcare coverage as a collateral source as well as a plaintiff's duty to mitigate damages by obtaining healthcare coverage. Thus, the process proposed will not change, and the ideas discussed in this paper will continue to influence future healthcare related disputes, whether or not a change in legislation occurs.

V. CONCLUSION

In and out of the courtroom, the Affordable Care Act is transporting insurance to the forefront of healthcare disputes. Before the ACA, insurance was not allowed to be brought in as evidence of a collateral source in collateral source jurisdictions, or as a defense relying on a plaintiff's duty to mitigate damages. Now, the scope has changed. These different uses of the ACA are not only allowed in the courtroom setting, but are being utilized in mediation and arbitration settings as well. As this area of the law is new and ever evolving, both mediators and arbitrators have a duty to understand the emerging case law. Only then can they best aid the parties involved in the case. Mediators should look at these issues from an evaluator's perspective, evaluating the knowledge level of the parties and then giving both sides opinions on their respective cases, whether or not the case will ultimately reach a settlement or go to trial. Arbitrators should use an Early Neutral Evaluation process in these cases in order to provide parties with a non-binding process where the arbitrator has the ability to give the parties advice and information regarding the claims. Even though the political status of healthcare law is a hot topic of debate right now, the proposals made in this paper will remain applicable even if the law changes. Therefore, mediators and arbitrators need to remain diligent in their understanding of the case law and its application to ADR proceedings.